Supreme Court, U.S.
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DOCKET NO.:

SUPREME COURT

OF THE UNITED STATES

October term, 1996.

UNITED STATES OF AMERICA

Appellee

US

GERARD DiSANTO

Appellant

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

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QUESTIONS TO BE PRESENTED

I. SHOULD THIS COURT GRANT CERTIORARI TO REVIEW THE FIRST CIRCUIT'S REFUSAL TO APPLY THE SUPREME COURT'S DECISION IN LOPEZ RETROACTIVELY IN DETERMINING IF THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT THE PROPERTY TO BE DAMAGED BY THE ALLEGED ARSON HAD A SUBSTANTIAL IMPACT ON INTERSTATE COMMERCE?

II. SHOULD THIS COURT GRANT CERTIORARI TO REVIEW THE FIRST CIRCUIT DECISION THAT BUSINESS PROPERTY PER SE FALLS WITHIN THE FEDERAL GOVERNMENT'S COMMERCE POWER, TO RESOLVE THE INCONSISTENCY WITH THE ELEVENTH CIRCUIT'S DECISION IN U.S. VS. DANELLI?

III. WAS THE EVIDENCE AGAINST THE DEFENDANT INSUFFICIENT TO SUPPORT HIS CONVICTION BECAUSE THE JURY WAS NOT COMPETENT TO MAKE A DETERMINATION AS TO THE AFFECT OF THE PROPERTY ON INTERSTATE COMMERCE ABSENT EXPERT TESTIMONY?

IV. DID THE COURT OF APPEALS DECISION IN REGARDS TO THE PREJUDICE OF THE PROSECUTION'S REFERENCE TO DEFENDANT'S GAY RESTAURANT FAIL TO ACCOUNT FOR THE PREJUDICIAL NATURE OF REMARKS DIRECTED TO A PERSON'S SEXUAL ORIENTATION?

V. DID THE TRIAL COURT'S INCREASE IN DEFENDANT'S SENTENCE BASED UPON THE JUDGE'S PERSONAL BELIEFS ON A TECHNICAL ISSUE UNSUPPORTED BY ANY EVIDENCE IN THE RECORD, SPECIFICALLY THE EFFECT OF A FIRE CAUSED BY AN INFLAMMATORY SUBSTANCE ON THE SAFETY OF FIREFIGHTERS AND MEMBERS OF THE PUBLIC, DENIED THE DEFENDANT DUE PROCESS OF LAW?

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STATEMENT OF BASIS OF JURISDICTION

The case for which the movant wishes to file a petition for writ of certiorari is United States of America vs Gerard DiSanto, No. 95-1584, which was decided by the United States Court of Appeals for the First Circuit, on June 14, 1996. An extension of time to file this Petition for Writ of Certiorari was previously granted by The Honorable David Souter on September 18, 1996, extending the time to file this petiton until November 11, 1996.

STATUTES TO BE REVIEWED

18 U.S.C. section 844

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined not more

than $20,000, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

STATEMENT OF FACTS

The Defendant was convicted of Arson under the Federal Arson statute, 18 U.S.C. section 844(i), for the alleged attempt to start a fire at a restaurant partially owned by the defendant, the Galleria II Restaurant, in Westport, Massachusetts. There was an attempt to start a fire by an employee of the defendant, who was arrested by state authorities for this crime. His assistance was solicited by the federal authorities in pursuit of a criminal action against the defendant, which included leniency for the penalties for his crime. Though state authorities did not pursue any criminal action against the defendant, he was indicted by a federal grand jury and convicted after a jury trial.

The building which was the subject of the attempted arson by defendant's employee was an old personal private residence which had been converted to a dual use. Part of it was used for the defendant's family restaurant, and part of it was rented as a private residence. Defendant's restaurant was located in a residential neighborhood in Westport, Massachusetts, and served patrons from the immediate community.

During the course of his trial, the prosecution introduced limited evidence of certain minor business activities to meet its burden of proving that the property which was the subject of the attempted arson by the defendant's employee had an affect on interstate commerce. The only evidence which was offered by the federal prosecutor was the fact that natural gas, which was delivered through interstate commerce, was used in the building, and that pizza shells[1] which were manufactured out of state were used at the restaurant.

During the trial, the prosecution solicited testimony from one of its own witnesses, who was the employee who attempted to start the fire at defendant's restaurant, Randy Schaller, to the effect that the defendant operated a gay nightclub in Providence, Rhode Island. Specifically, the prosecutor solicited the following testimony from Mr. Schaller:

Q. Now, in the beginning of the restaurant when it first opened, how often did you speak with defendant about the Galleria II Restaurant?

A. On a daily basis.

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[1] The pizza shells were a minor item at defendant's restaurant, constituting an insignificant portion of the business's expenses or operations.

Q. When you say "daily basis," was that on the phone or in person?

A. Usually in person.

Q. Where was that at?

A. At the club that he owns in Providence, Gerardo's.

Q. What type of club is that?

A. A gay night club.

In responding to an objection by defendant's counsel, the prosecuting attorney argued that this was just background information. The court rejected this argument, and instead voir dired each juror at sidebar, pointing out to them that the defendant operated a gay bar and asking them whether this would affect their decision. Each juror answered in the negative.

At defendant's sentencing, the court imposed on the defendant the enhancement required by section 2K1.4(a)(1) of the USSG, for intentional endangerment of other individuals. This was based upon the possibility of an accidental ignition of the gasoline fumes, or the danger to which firefighters would be subjected if the fire had actually been ignited. There was no expert testimony introduced to

support this finding, rather the judge relied upon his own experience and knowledge to make this finding.

The defendant has filed the Petition for Writ of Certiorari seeking review of the decision of the First Circuit Court of Appeals confirming his conviction.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIRST CIRCUIT'S REFUSAL TO APPLY THIS COURT'S DECISICN IN LOPEZ RETROACTIVELY IN DETERMINING IF THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT THE PROPERTY TO BE DAMAGED BY THE ALLEGED ARSON HAD A SUBSTANTIAL IMPACT ON INTERSTATE COMMERCE

The Defendant's conviction for arson pursuant to 18 U.S.C. section 844(i) required a showing that the property that was to be damaged was used in interstate commerce or used in an activity affecting interstate commerce. As noted above, the only evidence introduced at trial that the building which was the subject of the alleged attempted arson had an affect on interstate commerce was the delivery of pizza shells from a vendor in a neighboring state, and the use of natural gas in the building which had been transported through interstate commerce. In reviewing whether this evidence was sufficient to support the defendant's conviction, the First Circuit

reviewed the sufficiency of the evidence under the plain error standard, because the issue raised by this court's decision in U.S. vs. Lopez ____ U.S. _____, 115 S.Ct. 1624, 131 L.Ed. 2d. 626 (1995), (Appellate decision, p. 1247) was not raised by defendant's trial counsel in the District Court proceeding.

This court should grant certiorari to reverse this decision and require the First Circuit Court of Appeals to determine whether the evidence submitted against the defendant complies with this court's decision in Lopez. Lopez had not been decided at the time that the defendant was convicted, and therefore defendant's counsel had no means of knowing that this issue should be raised. The Appellate Court recognizes this distinction when, in reviewing the trial court's actions, the Appellate Court states "We find no plain error. At the time of the district court's decision, Lopez had not yet - been decided and there was no reason for the district court to question the viability of Russell or Medeiros. Under Medeiros, the government need only show, and the jury need only find, a de minimis connection to interstate commerce in order to sustain a Conviction under 18 U.S.C, section 844(i). Medeiros, 897 F.2d. at 16-17." Appellate decision, p. 1247. Despite the Appellate Court's finding that the trial court could

not have known of the standard created by this Court's decision in Lopez, it is using the lower standard to review defendant's conviction because defendant's trial lawyer should have anticipated this ruling and raised this issue in the trial court.

This is also inconsistent with the Appellate Court's decision to review the constitutionality of the federal arson statute de novo. Appellate decision, p. 1244. The sufficiency of the evidence against the defendant based on Lopez is a constitutional issue, specifically that the trial court lacked jurisdiction because there was insufficient evidence to show that the prohibited activity was an appropriate exercise of the federal government's power to regulate interstate commerce. In upholding the constitutionality of the federal arson statute, the Appellate Court specifically relied upon the jurisdictional requirement in the statute to find that the statute was constitutional. "Here, too, the federal arson statute contains the requisite jurisdictional element which similarly ensures that, case-by-case, the property damaged by the arson must have been 'used in interstate... commerce or in an activity affecting interstate ... commerce.'" (Appellate decision, p. 1245) (citations omitted). It is inconsistent for the Appellate

Court to find the federal arson statute constitutional because it has a jurisdictional element requiring the affect on interstate commerce to comply with the Lopez standard, and then to judge the adequacy of the evidence against the defendant proving this element under a standard lower than that required by Lopez.

In addition, the Appellate Court's refusal to review this evidence under the Lopez standard is inconsistent with decisions in other Circuit Court of Appeals, specifically U.S. vs. Sherlin, 67 F.3d. 1208, 1213-34 (6th Cir. 1995) and U.S. vs. Pappadopoulos, 64 F.3d. 522 (9th Cir. 1995); US. vs Danelli, 73 F.3d. 328 (11th Cir. 1996).

For these reasons, this Court should grant the defendant's Petition for Writ of Certiorari.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIRST CIRCUIT DECISION THAT ANY PROPERTY UTILIZED FOR ANY BUSINESS PURPOSE WHATEVER, PER SE FALLS WITHIN THE FEDERAL GOVERNMENT'S COMMERCE POWER, TO RESOLVE THE INCONSISTENCY WITH THE ELEVENTH CIRCUIT'S DECISION IN U.S. VS. DANELLI.

In considering the Defendant's challenge to the sufficiency of the evidence supporting this requirement for his conviction,

the First Circuit held that, pursuant to its decision in U.S. vs. Medeiros, 897 F.2d. 15 (1st Cir. 1990), only a diminimis effect on interstate commerce is required of the government to support a conviction. Appellate decision, p. 1247. It further held that property which is utilized for any business purpose whatsoever always meets this diminimis test. Appellate decision, p. 1248. This is clearly inconsistent with this court's decision in Lopez, insofar as Lopez required a "substantial" impact on interstate commerce for the proscribed conduct to fall within Congress' power to regulate interstate commerce. The fact that property may be rented, or may have a business operation conducted on it, no matter how incidental, has no more automatic affect on interstate commerce than a school. The nature of the rental property, or the business conducted on the property, can clearly be intrastate only. It is true that it can be argued that any activity can have an impact on interstate commerce, this was shown by the government's arguments in Lopez that possession of guns on or near school property hampered the educational process, and thereby affected interstate commerce because less well educated students make poorer workers. This court correctly noted that the acceptance of such arguments would enable

the federal government to regulate any activity "(T)he Court has never declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. We conclude, consistent with the great weight of our caselaw, that the proper test requires an analysis of whether the regulated activity -substantially affects- interstate commerce." Lopez, (citations omitted)

This decision is also contrary to the Eleventh Circuit's decision in U.S. vs. Danelli, 73 Fd3 328 (11th Cir. 1996). In Danelli, the defendant was accused of committing arson on property which was a personal residence, but in which the owner operated his office and performed work for an interstate and international company. The court noted that the government had offered as proof of the property's impact on interstate commerce, by the operation of the owner's business from the location, his use of computer equipment and related supplies, and his delivery of reports and memorandum to the international company. Despite this business use of the property damaged by the alleged arson, the court found that there was insufficient evidence to support

a conviction, and dismissed the charges against the defendant.

Certainly the facts of this case are no stronger for a finding of an affect on interstate commerce as were present in Danelli. In this case, the property that was the target of the alleged arson was a private residence incorporating a neighborhood family restaurant. The only direct involvement in interstate commerce was the delivery of natural gas, common to both cases, and the delivery of pizza shells. The delivery of pizza shells, which represented a minimal cost of a minor portion of the restaurant sales, is certainly no greater an impact on interstate commerce than the use of the computer equipment, software and supplies (presumably products delivered through interstate commerce) and the delivery of reports and memorandum used by a company involved in interstate commerce. But the most important fact is that the court in Danelli did not find as a matter of law that the application of the federal arson statute to this particular case was a proper exercise of the government's power to regulate interstate commerce because of the business nature of the property. It was necessary for the court to review the facts of the particular case to make that determination.

The First Circuit's decision is also inconsistent with the District Court decision in Hoffman vs. Hunter, 923 F.Supp. 791 (WD NC, 1996). In that case, the court considered the constitutionality of the federal statute which regulates protests outside of abortion clinics. Though abortion clinics are obviously commercial enterprises, the court still held that regulation of protests outside these clinics was outside the federal governments commerce powers.

The First Circuit decision further attempted to support its judgment by holding that, even if Lopez overruled the grounds noted above for supporting the defendant's conviction, there was still sufficient evidence to find that the property to be damaged by the attempted alleged arson had an affect on interstate commerce. However, this again is inconsistent with the Eleventh Circuit's decision in Danelli. In this case, the First Circuit cited the evidence concerning the delivery of interstate natural gas to the residence, and the purchase of pizza shells delivered interstate. However, in Danelli, the residence in which the business office was operated also received interstate natural gas, and it can be presumed that interstate goods were bought or delivered as part of the business operations (the court noted that the owner of the

property used computer equipment in his office). Despite these facts, the court still found that there was insufficient evidence to support the conviction, and dismissed the charges against the defendant.

In Lopez, this court noted the limitation of the federal government's power to regulate interstate commerce, and that it cannot be based upon a series of unlimited conclusions. It also emphasized the importance of protecting our federal system and the state's traditional areas of responsibility. The First Circuit's opinion admits that criminal charges for arson are traditionally an area of the state's responsibility, and that the federal arson statute is not directly regulating commerce. A per se rule, as adopted by the First Circuit, would limit the state's responsibility to private property without any business use, expanding the federal government's authority to most property. This would effectively eliminate any effect of this court's decision in Lopez. A more appropriate standard would be to make such decisions on a case by case basis, as adopted by the Eleventh Circuit in Danelli.

It is clear that the First Circuit has refused to grant any effect to this court's decision in Lopez, which has created an

inconsistency with the Eleventh Circuit. In order to resolve this inconsistency, and to clarify the standard of evidence required to support a criminal conviction which affects interstate commerce, this court should grant certiorari in this case.

III. THE EVIDENCE AGAINST THE DEFENDANT WAS INSUFFICIENT TO SUPPORT HIS CONVICTION BECAUSE THE JURY WAS NOT COMPETENT TO MAKE A DETERMINATION AS TO THE AFFECT OF THE PROPERTY ON INTERSTATE COMMERCE ABSENT EXPERT TESTIMONY

The only evidence offered by the government to support its claim that the property to be damaged by the alleged attempted arson was involved in or affected interstate commerce was the testimony of Peter Thanas, Senior Vice President and Treasurer for Fall River Gas Company, who testified regarding the supply of gas to the property, and testimony from the vendor concerning the purchase of pizza shells which were delivered as part of interstate commerce. The judge's instructions stated that only a "diminimis" effect on interstate commerce was necessary for the jury to find the defendant guilty under the federal statute (Appellate decision,

p. 1247, n. 7).[2] Based upon this evidence, and these instructions, the jury found that the property did have an affect on interstate commerce. However, based upon this evidence, the jury was not competent to make this finding. The jury in effect is being asked to determine the extent that the delivery of these two products impacted interstate commerce. This is clearly outside the competency of the average lay person. It requires knowledge of the specific industries, the manner in which the goods are delivered, and the impact the delivery of these goods to the defendant's property had on business activities outside the state of Massachusetts. Though the jury may have been presented with facts concerning the delivery of natural gas and pizza shells to defendant's business, there was no basis for them to make a finding concerning the impact the delivery of these goods had on interstate commerce. Therefore there was insufficient evidence for the jury to convict the defendant.

Though the jury may have been qualified to make a finding concerning the impact this property had on interstate commerce based upon the previous standard requiring only a

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[2] The propriety of the judge's instructions on this issue was not appealed by the defendant's trial attorney. Appellate decision, p. 1247, fn7.

de miminimis impact, the standard now imposed by Lopez clearly requires the jury to make a much more substantive decision. Specifically, they must find that the property to be damaged by the alleged attempted arson had a substantial affect on interstate commerce. It is the defendant's contention that the jury is not qualified to make this determination absent testimony from an expert witness.

This is an important issue justifying the issuance of a writ of certiorari. It is a procedural issue which should be resolved quickly to eliminate the need to relitigate numerous cases in which no expert testimony is presented by the government. In addition, by requiring expert testimony from the government to support its claim concerning interstate commerce, it will diminish the need for appellate courts to make a case by case review of the impact on interstate commerce of every related conviction. Presumably expert testimony as to what is a substantial impact on interstate commerce will eliminate the issue as to whether the jury has sufficient evidence to make a finding in that regard. For this reason, this court should issue a Writ of Certiorari to review the defendant's appeal.

IV. THE COURT OF APPEALS DECISION IN REGARDS TO THE PREJUDICE OF THE PROSECUTION'S REFERENCE TO DEFENDANT'S GAY RESTAURANT FAILED TO ACCOUNT FOR THE PREJUDICIAL NATURE OF REMARKS DIRECTED TO A PERSON'S SEXUAL ORIENTATION

In Romer vs. Evans, _____ U.S. _____, 116 S.Ct. 1620, 134 L.Ed.2d. 855 (1996), this court recently had an opportunity to review the special nature of prejudice against an individual because of their sexual orientation. This case directly impacts on the defendant's conviction, because of the nature of the remarks made by the prosecutor in regards to the supper club operated by the defendant in Providence, which was described by the government's witness as a "gay" nightclub. It is obvious from the context of the remarks and the questions that elicited them that this was an intentional act by the prosecutor. The question was completely unnecessary given the context of the questioning of Mr. Schaller. It is also obvious from the remarks of the district court judge, despite the characterization of the episode by the appellate court, (Appellate decision, p. 21) that he considered the remarks highly prejudicial. This resulted in the court taking the extraordinary step of questioning the jurors

individually concerning the irrelevant and prejudicial nature of the remark. The question raised by the defendant is whether this was sufficient to remedy the prejudice and bias caused by the prosecutor's actions in soliciting this testimony.

The only excuse given by the prosecution for this remark was that it was introduced for "background information." This justification was clearly rejected by the trial court. Court transcript, p. 99. However, the subsequent voir dire by the trial judge was insufficient to correct the prejudice caused by this statement. First, an honest answer that this information would affect a person's deliberations of the evidence would have been an admission of homophobia. Though there is certainly a great deal of bias against homosexuals, it is also clear, especially in a jurisdiction such as Massachusetts, that a public admission of such prejudice would be met with public disapproval. This would impose a substantial pressure on a juror not to answer the question with complete candor. Such a person would not be able to provide the defendant with the impartial deliberations to which the defendant was entitled under the Constitution.

In addition, during jury deliberations, a person who was gay, but would not want that fact disclosed, would be under

pressure not to appear to support the defendant, in order to avoid expressing sympathy for someone who was involved in the gay community. This Court has noted the importance of providing protection against discrimination based upon sexual orientation both in Romer and Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U. S. ___, ___ (1995). Permitting the sitting jury to deliberate the defendant's innocence or guilt after the comments made by the prosecutor denies this protection both to potential gay members of the jury and to the defendant himself.

The prejudicial nature of these remarks is evidenced by the initial reaction of the court to defense counsel's request for a mistrial. The court obviously rejected the prosecution's attempts to characterize the testimony he solicited as background information. He clearly dismisses the prosecutor's attempt to characterize the testimony as non-prejudicial. Court transcript, pages 99-101. The trial judge further noted that the testimony would likely prejudice the jury. However, he then does a complete reversal, simply inquiring of each juror whether this testimony would affect their decision. Not only was this questioning unreliable to determine whether there was any prejudicial impact from the

prejudicial testimony, as argued above, but it in fact only acted to highlight the prejudicial impact of the improper testimony by emphasizing it individually to each juror. In addition, the court compounded its error by referring to defendant's establishment as a gay "bar" rather than night club or supper club, creating an even more prejudicial picture for the jury. Finally, the court failed to instruct the jury before or after the questioning that the defendant's involvement with the gay community, whether personal or just for business purposes, should not affect their decision. This leaves open the possibility that, though at the time of the questioning this testimony would not have affected any of the jurors' decision, it may have had an impact during deliberations because they were not instructed to disregard the fact that the defendant operated a gay restaurant.

It should be noted that the prosecutor made no attempt to disclose during jury selection his intention to raise this issue during the trial, so that any potential prejudice could be addressed during jury selection. The only conclusion that can be drawn from this failure to disclose this tactic to the court and defendant's counsel is that the prosecutor knew the

potential prejudice to be caused by the disclosure of this evidence, and used it to his advantage.

For these reasons, this Court should grant the defendant's Petition for Writ of Certiorari to review the prejudicial impact of the prosecutor's disclosure of the defendant's connection with the gay community, and the propriety of ignoring this prejudice through the ineffective method of asking the jury to disclose any homophobic prejudices that they hold personally.

V. THE TRIAL COURT'S INCREASE IN DEFENDANT'S SENTENCE BASED UPON THE JUDGE'S PERSONAL BELIEFS ON A TECHNICAL ISSUE UNSUPPORTED BY ANY EVIDENCE IN THE RECORD, SPECIFICALLY THE EFFECT OF A FIRE CAUSED BY AN INFLAMMATORY SUBSTANCE ON THE SAFETY OF FIREFIGHTERS AND MEMBERS OF THE PUBLIC, DENIED THE DEFENDANT DUE PROCESS OF LAW.

In upholding the trial court's application of section 2K1.4(a)(1) of the USSG, the Court of Appeals relied upon the trial court's findings that there existed a chance of an air fuel explosion or an accidental ignition from the gasoline poured in the attic of defendant's restaurant. The basis for this, however, is the court's and probation officer's personal belief, unsupported by any evidence, of the potential for this to have occurred. Appellate decision, p. 1255. This is clearly

inadequate for such a determination. In fact, it is not clear that such a result was possible given the conditions which existed at the time. In any event, it is inappropriate for the judge to rely solely on his common sense to determine the dangers caused by the gasoline in that particular building. Whether such an explosion would have occurred is outside the scope of the knowledge of the average lay person. The dangers any fire would have caused in such a building to firefighters or members of the public is also outside the knowledge of the average lay person. The determination made by the court based upon the judge's own personal views had the effect of substantially increasing the defendant's time of incarceration, and effectively was a denial of his right to Liberty. Such a denial must be made with due process of law. U.S. Const., amend 5. There was no due process provided to the defendant in this decision. The defendant was not given notice beforehand what evidence would be used to make this decision, he was not given an opportunity to introduce evidence to contest the proposed findings, and he was not given an opportunity to cross examine the witnesses against him. In addition, the defendant was not provided an impartial factfinder, in that the

judge in the case was both the source of evidence against the defendant and the judge of the validity of that evidence. Though a court can take into account facts within common knowledge of the average person, the effect of an ignition of an accelerant is beyond the knowledge of the average lay person. It is the reason there are fire marshalls and other experts that examine the scenes of fires. It is a denial of due process to permit a judge to make a final determination depriving a party of liberty based solely on his unsupported and incompetent beliefs.

For this reason, this court should grant the defendant's Petition for Writ of Certiorari

Dated at Lexington, Kentucky this th day of January, 1997.

Gerard DiSanto
Pro-se Petitioner
Fed. Reg. No. 20200038
Antaeus Unit
Federal Medical Facility
P.O. Box 14507
Lexington, KY 40512-4507

DOCKET NO.:

SUPREME COURT

OF THE UNITED STATES

October term, 1996.

UNITED STATES OF AMERICA

Appellee

US

GERARD DiSANTO

Appellant

On Petition for Writ of Certiorari to the United States

Court of Appeals for the First Circuit

CERTIFICATION OF SERVICE

This is to certify that a copy of this Petition for Writ of Certiorari has been served, by U.S. Mail, First Class, Postage Prepaid, by depositing it with the appropriate officials at the Federal Medical Facility in Lexington, Kentucky, on the following parties of record (under separate cover):

Solicitor General of the United States
Room 5614
Department of Justice
10St. & Constitution Ave., N.W.
Washington, DC 20530

John M. Griffin, Esq.

Assistant United States Attorney
1003 J.W. McCormack POCH
Boston, MA 02109

Pursuant to 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed at Lexington, Kentucky this day of January, 1997.

Gerard DiSanto
Pro-se Petitioner

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 95-1584

UNITED STATES,

Appellee,

v.

GERARD DISANTO,

Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Reginald C. Lindsay, U.S. District Judge]

Before

Torruella, Chief Judge,

Coffin, Senior Circuit Judge,

and Cyr, Circuit Judge.

Paul J. Haley, with whom Law Office of Paul J. Haley, was on brief for appellant.

John M. Griffin, Assistant United States Attorney, with whom Donald K. Stern, United States Attorney, was on brief for appellee.

June 14, 1996

TORRUELLA, Chief Judge. After a nine-day trial, Appellant Gerard DiSanto ("Appellant") was convicted for attempted arson in violation of 18 U.S.C. § 844(i), the federal arson statute, which makes it a federal crime to destroy by means of fire property used in or affecting interstate or foreign commerce; and for conspiracy to commit arson in violation of 18 U.S.C. § 371. Appellant appeals his conviction as well as his sentence on a number of grounds. For the following reasons, we affirm the district court's judgment and sentence in all respects.

FACTUAL AND PROCEDURAL BACKGROUND

Presenting the facts in the light most hospitable to the jury's verdict, see United States v. Staula, 80 F.3d 596, 599 (1st Cir. 1996); United States v. Ortiz, 966 F.2d 707, 711 (1st Cir. 1992), cert. denied, 506 U.S. 1063 (1993), the evidence presented during the nine-day trial tended to show the following.

The Galleria II was a family-style restaurant and pub serving Italian food and pizza, located in Westport, Massachusetts (the "restaurant"), which was owned by three partners: Appellant, Robert Ashness ("Ashness") and Dr. Louis Aguiar ("Dr. Aguiar"). The restaurant was located in a building

which Appellant and Ashness leased from Dr. Aguiar and Fernando Lópes ("Lópes").

The lease agreement provided, among other things, for a monthly rent of $3,600 and an option for the restaurant owners to purchase Lópes' share in the property. The restaurant received natural gas and food supplies that moved through interstate commerce. Although very successful during the summer months of 1991, its first year of operation, the Galleria II's business proved to be seasonal and business slowed considerably after the summer. In addition to the slow business, there were significant problems with the building's water and septic systems and the relationship between Appellant and Dr. Aguiar deteriorated over who was responsible to pay for the required improvements: the restaurant, as tenant, or Dr. Aguiar and Lópes, as landlords.

Among the Galleria II's employees, Randy Schaller ("Schaller") served as chef and as kitchen manager; and Shelley McKenna ("McKenna") served as the bar manager and hostess and was also responsible for the cash and bookkeeping. Both Schaller and McKenna had longstanding business relationships with Appellant and considered him a friend. Beginning in the fall of 1991, Appellant began discussing with Schaller the need for renovating the restaurant. In addition to correcting the water and septic systems, Appellant proposed that an outside roof-top deck be installed for the purpose of increasing liquor sales during the peak summer season. Appellant told Schaller that he wanted to finance the renovations by burning the top of the restaurant above the second floor as the insurance proceeds from the fire would provide funds for the renovations. As part of his plan, Appellant increased the Galleria II's existing insurance coverage (building, contents, and premises liability) by purchasing $90,000 of business interruption insurance, which became effective December 3, 1991, two months before the arson attempts. The proceeds from the business interruption coverage could have been used for any purpose, including for the repair of the water and septic systems.

On or about February 19, 1992, after unsuccessfully attempting to hire someone else to burn the top of the restaurant, Appellant attempted to set a fire himself by igniting a stack of papers in the attic of the restaurant. The fire burned out, however, before it could fully ignite the exposed wood frame. Both Schaller and McKenna, who had been drawn to the attic because of the open attic door, discovered Appellant standing over the burning stack of papers and refused to get involved. During the days following his first failed attempt, Appellant asked Schaller if he would help by pouring gasoline on the attic rafters as part of a plan whereby Appellant would return later to ignite the gasoline. After repeatedly declining to get involved, Schaller finally agreed to assist Appellant.

Shortly after noon on February 23, 1992, Schaller poured gasoline, as Appellant had requested, onto the exposed attic rafters and insulation and informed Appellant that he had done so. About mid-afternoon, Appellant and Schaller left the restaurant. At approximately 4:00 p.m. that same afternoon, the Westport Fire Department responded to a complaint from the restaurant that there was a strong odor of gas, which both patrons and employees at the restaurant had detected. After evacuating the building, the firefighters discovered the gasoline-soaked boards and insulation as well as evidence of charring on the attic floor and ceiling. According to the fire department, the charring was unrelated to the much larger area of the attic that was saturated with gasoline, representing a separate, previous attempt to start a fire.

A few days later, Schaller admitted to the police that he had poured the gasoline. Although Appellant told law enforcement officials that he would fire Schaller when they informed him of Schaller's confession, Appellant never fired Schaller, and Schaller worked at the restaurant until it closed. On December 6, 1993, Schaller entered a plea of guilty to the federal indictment charging him with the second attempted arson. Pursuant to his plea agreement, he agreed to cooperate with law enforcement officials. As part of that cooperation, Schaller engaged in four conversations -- three in person and one by

telephone -- with Appellant that were recorded by law enforcement agents.[1] In July 1994, a two count indictment was returned by the federal grand jury charging Appellant with attempted arson of a building affecting interstate commerce under 18 U.S.C. § 844(i) and conspiracy to commit arson under 18 U.S.C. § 371. Prior to trial, Appellant filed a motion in limine to exclude from evidence the four recorded conversations between Appellant and Schaller, which included incriminating statements made by Appellant. After a hearing, the court denied the motion and admitted the tapes after certain portions were excised.

During a nine-day trial on the merits, in which nine witnesses testified for the prosecution (including Schaller, pursuant to his plea agreement), the prosecution presented its theory that Appellant attempted to burn the restaurant in order to recover insurance proceeds to finance renovations and improvements of the restaurant. The defense called three witnesses, including McKenna. Among other matters, the witnesses testified that Schaller's reputation for truthfulness was "zero;" that the business interruption insurance was purchased as a result of significant storms which had caused the Galleria II to close; that, after leaving with Schaller during the afternoon of February 22, Appellant had no intention of returning to the restaurant; and that Appellant was with McKenna during the evening of February 22, planning their next day's business trip.

During the trial, Appellant moved for a mistrial, which was denied, on the grounds that improper testimony regarding his ownership of a "gay night club" was prejudicial. Both at the close of the government's case-in-chief and at the close of all the evidence, Appellant moved for judgment of acquittal on the ground that the evidence was insufficient to establish that the Galleria II was a building affecting interstate commerce. The district court denied both motions.

Based on the foregoing and other evidence, the jury convicted Appellant on February 10, 1995, on both counts of attempted arson and conspiracy to commit arson. Appellant subsequently

moved for a new trial which the district court denied. On May 25, 1995, the district court sentenced Appellant to a term of seventy-eight (78) months' imprisonment, imposed a fine of $12,500, restitution to the Westport Police Department in the amount of $386, and ordered supervised release for three (3) years. Appellant appeals both his conviction and his sentence. We have jurisdiction pursuant to Rule 4(b) of Federal Rules of Appellate Procedure.

DISCUSSION

I. Appellant's Motions for Judgment of Acquittal

Appellant claims reversible error in the denial of his motions for judgment of acquittal. See Fed. R. Crim. P. 29. Below, Appellant based his motions for acquittal on sufficiency of the evidence grounds, which included the argument that there was insufficient evidence to prove the requisite nexus to interstate commerce under the federal arson statute.[2]

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce . . . [is guilty of a crime].

18 U.S.C. § 844(i) (1994). On appeal, he raises new arguments based on the Supreme Court's decision in United States v. López, ___ U.S. ___, 115 S. Ct. 1624 (1995), which struck down the Gun Free School Zone Act, 18 U.S.C. § 922(q), as exceeding Congress' authority under the Commerce Clause[3] to regulate interstate commerce. Appellant now argues that, in light of López, the federal arson statute is unconstitutional and that, accordingly, the district court lacked subject matter jurisdiction. In the alternative, Appellant argues that under López there is insufficient evidence to prove that the Galleria II was a building that "substantially affected" interstate commerce.

Specifically, Appellant now claims that this is a simple state arson case which Congress has no power under the Commerce Clause to federalize and thereby undercut Massachusetts' power to prosecute Appellant under its own arson statute, Mass. Gen. Laws Ann. ch. 266, § 1. In support of this argument, Appellant insists that López effectively overruled the Supreme Court's earlier decision in Russell v. United States, 471 U.S. 858, 859 (1985), which concluded that the federal arson statute expresses Congressional intent to exercise its full power under the Commerce Clause. Id. (holding that rental property was property used in an activity affecting interstate commerce within the meaning of the federal arson statute). Consequently, Appellant challenges the "continuing viability" of United States v. Medeiros, 897 F.2d 13 (1st Cir. 1990), in which we held that after Russell rental property is per se "unquestionably sufficiently connected to interstate commerce to confer jurisdiction" and satisfy the jurisdictional element of the federal arson statute. Id. at 16-17. Appellant, thus, urges us to reexamine our holding in Medeiros in light of López' "substantially affect" nexus requirement between the illegal activity and interstate commerce, and reverse his convictions on the grounds that the evidence does not prove that the attempted arson of the Galleria II "substantially affects" interstate commerce.

1. The Constitutionality of Section 844(i)

A. Standard of Review

Although Appellant failed to raise his López-based challenge below,[4] a claim that a statute is unconstitutional or that the court lacked jurisdiction may be raised for the first time on appeal. United States v. Seuss, 474 F.2d 385, 387 n.2 (1st Cir.), cert. denied., 412 U.S. 928 (1973); see also, Fed. R. Crim. P. 12(b)(2) (lack of jurisdiction may be noticed by the court at any time). We review a determination of the constitutionality of a federal statute de novo. See United States v. Díaz-Martínez, 71 F.3d

946, 953 (1st Cir. 1995) (applying, without explicitly stating so, de novo review to López-based constitutional challenge not raised during pre-López proceedings); United States v. Sherlin, 67 F.3d 1208, 1213-14 (6th Cir. 1995) (applying de novo review to López-based constitutional challenge to the federal arson statute), cert. denied, 116 S. Ct. 795 (1996); United States v. Aguilar-Aranceta, 957 F.2d 18, 21 (1st Cir. 1992) (reviewing de novo questions of constitutional law). But see United States v. Spires, 79 F.3d 464, 465 (5th Cir. 1996) (reviewing only for plain error López-based constitutional challenge not raised below during pre-López proceedings); United States v. Dupaquier, 74 F.3d 615, 619 (5th Cir. 1996) (same); Daigle v. Maine Medical Center, Inc., 14 F.3d 684, 687-88 (1st Cir. 1994) ("The raise-or-waive rule applies with full force to constitutional challenges."). Regardless of what standard of review we apply, the result is the same since even under the more favorable de novo standard, we reject Appellant's constitutional and jurisdictional challenges, finding that López in no way provides grounds for reversal in this case.

B. Discussion

As with the federal arson statute at issue here, Congress has often invoked its authority under the Commerce Clause to federalize criminal activity. Appellant points to López and its invalidation of the Gun Free School Zone Act[5] as evidence that the Supreme Court's present position is to restrictively interpret the Commerce Clause when it is used as a foundation for a criminal statute. See López, 115 S. Ct. at 1631 n.3 ("Under our federal system, the 'States possess primary authority for defining and enforcing the federal law.'" (quoting Brecht v. Abrahamson, 507 U.S. 619,
635 (1993))). The López Court recognized three categories of activity which Congress may regulate under the Commerce Clause: (i) "the use of the channels of interstate commerce"; (ii) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (iii) "those activities

that substantially affect interstate commerce." López, 115 S. Ct. at 1629-30.

After López, the Court explained in United States v. Robertson, ___ U.S. ___, 115 S. Ct. 1732 (1995) (per curiam), that these three bases of congressional authority are analytically distinct, reaffirming the distinction between activities engaged in interstate commerce and purely intrastate activities having a substantial effect on interstate commerce. See Robertson, ___ U.S. at ___, 115 S. Ct. at 1733. The Court stated that the "'affecting commerce' test was developed in our jurisprudence to define the extent of Congress' power over purely intrastate commercial activities that nonetheless have substantial interstate effects." Id. at ___, 115 S. Ct. at 1733 (emphasis in original) (concluding that transporting equipment and workers from out of state fell within 18 U.S.C. § 1962(a)'s alternative criterion without regard to the "affecting commerce" test).

We consider the federal arson statute and the Court's pre-López holding in Russell in light of this framework, concluding that López does not invalidate 18 U.S.C. § 844(i). First, by its plain language, Section 844(i) clearly falls under both the second and third López categories in that it protects property that is either "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i) (emphasis added).

Second, the federal arson statute contains the requisite "jurisdictional element" and thus is readily distinguishable from the provision invalidated in López. As we recently noted in Díaz-Martínez, the Supreme Court in López "found significant that the statute in that case, 18 U.S.C. § 922(q) [the federal firearms possession statute], 'contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.'" Díaz-Martínez, 71 F.3d at 953 (quoting López, 115 S. Ct. at 1631). We held that, unlike López, the jurisdictional element was present in 18 U.S.C. § 922(k) because it contains a specific requirement that the firearm with

the obliterated serial number have been "shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(k); Díaz-Martínez, 71 F.3d at 953 (holding that "[w]hatever the reach of López, it does not invalidate 18 U.S.C. § 922(k)"). Here, too, the federal arson statute contains the requisite jurisdictional element which similarly ensures that, case-by-case, the property damaged by the arson must have been "used in interstate . . . commerce or in an activity affecting interstate . . . commerce." 18 U.S.C. § 844(i).

Third, while the federal arson statute is similar to that struck down in López in that it does not regulate commercial or economic activity, see United States v. Pappadopoulos, 64 F.3d 522, 526-27 (9th Cir. 1995), it does regulate the damage or destruction of business property that satisfies the requisite interstate nexus, see Russell, 471 U.S. at 860-62 ("Congress at least intended to protect all business property"); United States v. Flaherty, 76 F.3d 967, 974 (8th Cir. 1996). Particularly in the absence of any mention of Russell in the majority opinion of López, we can find no reason to conclude that López invalidates Russell's analysis of Section 844(i)'s purpose and legislative history or its conclusion that the federal arson statute constitutionally regulates arson of business property that satisfies the requisite jurisdictional element. Russell, 471 U.S. at 860-62. After all, whatever López' reach, it certainly did not purport to overrule cases upholding application of the Commerce Clause power to wholly intrastate activities satisfying the requisite nexus to interstate commerce. See United States v. Genao, 79 F.3d 1333, 1336 (2d Cir. 1996).

Furthermore, we reject Appellant's argument that Section 844(i) is unconstitutional because it improperly intrudes into Massachusetts' primary authority for defining and enforcing the criminal law. By virtue of the fact that the federal arson statute is a criminal law it indeed intrudes upon states' traditional dominion over the criminal law. López, 115 S. Ct. at 1631 n.3 ("Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" (quoting Abrahamson, 507 U.S. at 635)). However, "not every federal

foray into criminal law is invalid." United States v. Bishop, 66 F.3d 569, 584 (3d Cir. 1995) (rejecting López-based challenge to the constitutionality of the federal carjacking statute, 18 U.S.C. § 2119). Where, as here, the criminal statute satisfies the constitutional limits of the Commerce Clause, it withstands the challenge that it interferes with the states' ability to define and enforce the criminal law. See Russell, 471 U.S. at 860-62. Finally, we note that we join our fellow circuits in arriving at the conclusion that 18 U.S.C. § 844(i) passes constitutional muster under López. See, e.g., Flaherty, 76 F.3d at 974; United States v. Denalli, 73 F.3d 328, 329 (11th Cir. 1996); Sherlin, 67 F.3d at 1213-14; Pappadopoulos, 64 F.3d at 526.

Because we find no basis to question the presumed validity of 18 U.S.C. § 844(i), we conclude that the district court properly had subject-matter jurisdiction conferred by virtue of the fact that Appellant was charged with an "offense against the United States." 18 U.S.C. § 3231. See United States v. Ryan, 41 F.3d 361, 363-64 (8th Cir. 1994) (noting that "if [the jurisdictional] element is not satisfied, thhen [defendant] is not guilty but the court is not by the failure of proof on that element deprived of judicial jurisdiction.").

2. Sufficiency of the Evidence

With respect to Appellant's claim that there was insufficient evidence to sustain his convictions, Appellant "faces an uphill climb," United States v. Valle, 72 F.3d 210, 216 (1st Cir. 1995). "If the evidence presented, taken in the light most agreeable to the government, is adequate to permit a rational jury to find each essential element of the offense of conviction beyond a reasonable doubt, then [Appellant's] claim fails." Id. (citations omitted). As the district court's disposition of a motion for judgment of acquittal is subject to de novo review, we, "like the trial court, must 'scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment whether a rational jury could find guilt beyond a reasonable doubt.'" Id. (quoting United States v. Taylor, 54 F.3d 967, 974 (1st Cir.

1995)).

After thoroughly reviewing the record[6] and applying these straightforward rules, we are convinced that a rational jury could have found beyond a reasonable doubt that the government had successfully proved each of the elements -- including, as we discuss more thoroughly below, the requisite nexus to interstate commerce -- of both Appellant's attempt and conspiracy convictions. Credibility determinations are uniquely within the jury's province; and, we defer to their determinations and the verdict if the evidence can support varying inferences. See, e.g., United States v. Cruz-Kuilan, 75 F.3d 59, 62 (1st Cir. 1996); United States v. González-Torres, 980 F.2d 788, 790 (1st Cir. 1992). Here, the record clearly supports the verdict. That the jury chose to believe the testimony presented by the government, particularly that of Schaller, and disbelieve that presented by the defense was well within its province.

As part of our sufficiency of the evidence review, we must determine whether the requisite jurisdictional element is met. Because it constitutes a jurisdictional predicate of the substantive offense, this "jurisdictional element," like other elements of the offense, must be proved to the jury beyond a reasonable doubt. See Pappadopoulos, 64 F.3d at 524; Medeiros, 897 F.2d at 15-17 (stating that the government need only show a de minimis connection to interstate commerce in order to satisfy this element). Thus, in order for Appellant to be found guilty under the federal arson statute, the government had to prove, among other things, that the property was either "used in" or "used in an activity affecting" interstate commerce. 18 U.S.C. § 844(i). This involves identifying for what activity or purpose the building is "used." Cf. Medeiros, 897 F.2d at 16 (focusing on the character of a fictitious building in determining whether it was sufficiently connected to interstate commerce).

On appeal, Appellant argues that there is insufficient evidence to prove that the Galleria II was a building used in or affecting

interstate commerce, because under López the evidence does not prove that the building "substantially affects" interstate commerce. Because Appellant did not raise this López argument below, we review only for plain error the district court's ruling on the sufficiency of the evidence regarding the jurisdictional element. United States v. Olano, 507 U.S. 725, 732 (1993) ("There must be an 'error' that is 'plain' and that 'affect[s] substantial rights.'"); United States v. Brand, 80 F.3d 560, 567-68 (1st Cir. 1996) (discussing Olano).

We find no plain error. At the time of the district court's decision, López had not yet been decided and there was no reason for the district court to question the viability of Russell or Medeiros. Under Medeiros, the government need only show, and the jury need only find, a de minimis connection to interstate commerce in order to sustain a conviction under 18 U.S.C. § 844(i). Medeiros, 897 F.2d at 16-17. Here, the government presented uncontested evidence that the object of the attempted arsons was a "building" that was being "used" as a commercial establishment, the Galleria II restaurant. The jury was presented with evidence that Appellant and his partners rented the building; that the building was supplied with natural gas which traveled in interstate commerce; and that the restaurant received food supplies for its operation which traveled in interstate commerce. Indeed, Appellant conceded at oral argument that the building was used as a commercial establishment which received food supplies and natural gas for its operation that travelled in interstate commerce. The district court correctly instructed the jury that the government had to prove beyond a reasonable doubt that the Galleria II was property "used in or [sic] affected interstate or foreign commerce."[7]or specifically challenge it on appeal. Viewing the evidence in the light most favorable to the jury verdict, this evidence more than satisfies Medeiros' de minimis requirement, and we therefore reject Appellant's insufficiency of the evidence argument.[8] See, e.g., Ryan, 41 F.3d at 364 (the de minimis standard "is easily met, even when the property is temporarily closed or vacant"); U.S. v. Menzer, 29 F.3d 1223, 1229 (7th Cir.) (finding interstate commerce connection where

building used partly as commercial business received natural gas and items purchased for resale that moved in interstate commerce), cert. denied, 115 S. Ct. 515 (1994); Medeiros, 897 F.2d at 16 (holding that rental property is per se property used in an activity affecting interstate commerce).

We only add this: Even assuming López requires more than a de minimis showing, we nonetheless find that the jury was presented with sufficient evidence to support its finding that the Galleria II was a building either "used in" or "used in an activity affecting" interstate commerce. Above, we found no reason to think that López in any way undercut Russell's conclusion that Congress has the authority to regulate arson of business property.[9] Similarly, we find no basis to conclude that López in any way undercuts Russell's holding that "rental property is unquestionably" an "activity" that affects interstate commerce within the meaning of 18 U.S.C. § 844(i). Russell, 471 U.S. at 862 ("We need not rely on the connection between the market for residential units and the 'interstate movement of people,' to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." (quoting McLain v. Real Estate Board of New Orleans, 444 U.S. 232, 245 (1980))); cf. Sherlin, 67 F.3d at 1213 (finding that building used in educational business of college was building used in an activity affecting interstate commerce). We, thus, reaffirm our holding in Medeiros that rental property is per se sufficiently connected to interstate commerce to confer federal jurisdiction under Section 844(i) and to satisfy the jurisdictional element. See Medeiros, 897 F.2d at 16. Because uncontested evidence was presented that, at the time of the attempted fires, Appellant and his partner rented the building in which the Galleria II was operated, the jury was presented with sufficient evidence to find that the building was "used in an activity affecting" interstate commerce within the meaning of 18 U.S.C. § 844(i)'s second category.

Even assuming further that López undermines Russell and Medeiros' holding regarding rental property, we would nonetheless affirm the jury's finding. Because uncontested

evidence was presented below that the building was used as a commercial establishment which received food supplies and natural gas for its operation that travelled in interstate commerce, the Galleria II also falls within 18 U.S.C. § 844(i)'s "real or personal property used in interstate . . . commerce." Because the Galleria II was property used in interstate commerce, we need not address whether its activities "substantially affect[ed]" interstate commerce. Cf. Robertson, ___ U.S. at ___, 115 S. Ct. at 1733.

In sum, because we are convinced that a rational jury could have found beyond a reasonable doubt that the government had successfully proved each of the elements, we affirm the district court's denial of Appellant's motions for acquittal.

II. Appellant's Motion for Mistrial

Appellant also appeals the denial of his motion for a mistrial on the grounds that improper testimony was prejudicial. We review the district court's decision for abuse of discretion. United States v. Rivera-Gómez, 67 F.3d 993, 998 (1st Cir. 1995) ("The trial judge is best situated to make a battlefield assessment that a particular piece of improper information may have on a jury."); United States v. Sepúlveda, 15 F.3d 1161, 1184 (1st Cir. 1993) ("Granting or denying a motion for mistrial is a matter committed to the trial court's discretion."), cert. denied, ___ U.S. ___, 114 S. Ct. 2714 (1994).

Appellant argues that the district court abused its discretion when it denied his motion for a mistrial which he made after Schaller testified that Appellant owned "a gay night club." The trial transcript shows that Schaller testified on direct as follows:

Q: Now, in the beginning of the restaurant when it first opened, how often did you speak with the defendant about the Galleria II Restaurant?

A: On a daily basis.

Q: When you say "daily basis," was that on the phone or in person?

A: Usually in person.

Q: Where was that?

A: At the club that he owns in Providence, Gerardo's.

Q: What type of club is that?

A: A gay night club.

(Transcript, Vol. 4 at 98-99). At this point, Appellant objected to the comment and moved for a mistrial on the grounds that the "comment was completely gratuitous . . . [a]nd it was designed specifically to, solely to[,] inflame the passions and prejudice of this jury." (Transcript, Vol. 4 at 99).

Although the court seemed to agree with the government that the information was offered as "strictly background information," the court was nonetheless concerned about the possibility that some jurors "may have a view that someone who runs a gay bar may not be an upstanding citizen." (Transcript, Vol. 4 at 99-100). The court decided to speak with the jurors individually to ascertain (i) whether the juror was affected by the testimony in any way; (ii) whether the juror would remain impartial; and (iii) whether the juror would be able to render a verdict based on the evidence and the law as instructed by the court, without regard to the fact that Appellant operated a gay night club. After every juror responded that he or she would not be affected by the testimony in rendering his or her verdict, (Transcript, Vol. 4 at 101-12), the court concluded, "All right. I'm satisfied." (Transcript, Vol. 4 at 113). At this point, and without further comment by counsel, testimony resumed. At the end of trial, Appellant did not request any additional questions be asked of the jurors or that any additional instructions be given.

Based on the record, and under the guiding principle that a district court may declare a mistrial only as a "last resort," Sepúlveda, 15 F.3d at 1184, we find that the district court's decision "was well within the broad range of its discretion." Rivera-Gómez, 67 F.3d at 999. The district court properly weighed the claim of impropriety and determined that it was unfounded based on his voir dire of the jurors. United States v. Hahn, 17 F.3d 502, 508 (1st Cir. 1994) ("A mistrial need not be allowed absent a clear showing of prejudice."). Moreover, the district court acted swiftly by polling the jurors immediately after the improper testimony.[10] Sepúlveda, 15 F.3d at 1185 ("Swiftness in judicial response is an important element in alleviating prejudice once the jury has been exposed to improper testimony."). The government argues that this polling effectively provided a curative instruction that the jurors were not to consider evidence that Appellant operated a gay night club in determining guilt or innocence. Given the questions asked and the responses received, we agree that the district court "efficaciously dispelled" any prejudicial effect of Schaller's statement by its immediate and thorough response. See United States v. Bello-Pérez, 977 F.2d 664, 672 (1st Cir. 1992) (affirming denial of motion for mistrial where "[a]ny prejudicial effect of the remark was efficaciously dispelled"). Finally, given the overwhelming evidence of guilt presented during the trial, the challenged testimony was innocuous. Bello-Pérez, 977 F.2d at 672 (denying mistrial where evidence of guilt was overwhelming).

III. Appellant's Motion for a New Trial and Motion in Limine

Third, Appellant appeals the denial of his motion for a new trial, arguing that the district court abused its discretion in denying his motion in limine[11] to exclude from evidence four tapes of recorded conversations between himself and Schaller in February, March and May 1994. As the motion for a new trial is not properly before us on appeal,[12] we only address Appellant's motion in limine.13 Appellant argued below, as he does now, that the tapes should have been excluded in their entirety from evidence because (i) their probative value was

substantially outweighed by their prejudicial effect under Fed. R. Evid. 403, even after certain portions were redacted; (ii) they were improperly admitted as evidence of "other crimes, wrongs, or acts" under Fed. R. Evid. 404(b); and (iii) portions of them were partially or wholly unintelligible which thereby rendered them more misleading than helpful.[14]

Here, the court listened to the four tapes, reviewed their respective transcripts, and heard arguments of counsel on the admissibility of both the tapes and the transcripts. In denying Appellant's motion in limine to exclude the tapes in their entirety under Fed. R. Evid. 403 and 404(b), the district court found that they were admissible as probative of the issues raised in the case and that they were "overall more relevant" than prejudicial. (Transcript, Vol. 2 at 12-13). The district court, however, did allow Appellant to make specific objections of undue prejudice. (Transcript, Vol. 2 at 13-15). After hearing argument from counsel, (Transcript, Vol. 4 at 4-47), the district court agreed with most of Appellant's specific objections and excluded those portions. With respect to Appellant's audibility argument, the district court only found the March 1, 1994, tape troubling in that it "seems . . . just woefully inadequate for any reasonable person to understand." (Transcript, Vol. 2-17). The district court's concern was that the only way to understand the tape was to read the transcript which resulted in the transcript -- and the Government's view -- being given too much weight. After considering alternatives and hearing arguments from counsel, the district court decided to admit the tape and allow the transcript because both parties had stipulated to the accuracy of the transcript as a true rendition of the recording. (Transcript, Vol. 2 at 4; Vol. 4 at 4). Finally, the district court gave cautionary instructions to the jury that the tapes were evidence but that the transcripts were not. The district court also ruled that the transcripts would not be permitted during deliberations.[15] (Transcript, Vol. 4 at 4-5).

We turn to Appellant's arguments, reviewing the district court's decision to admit or exclude evidence under Fed. R. Evid. 403 and 404(b) for abuse of discretion. See, e.g., United States v.

Frankhauser, 80 F.3d 641, 648 (1st Cir. 1996); United States v. Cruz-Kuilan, 75 F.3d 59, 61 (1st Cir. 1996). The same standard of review applies regarding the district court's decision to admit the tapes over Appellant's audibility argument. See United States v. Jadusingh, 12 F.3d 1162, 1167 (1st Cir. 1994) ("As we have held on numerous occasions, a trial judge's ruling on the admission of recordings is afforded 'broad discretion,' even where portions of the taped conversation are unintelligible.").

A. The Tapes' Relevancy

Evidence is excludable under Fed. R. Evid. 403 "if its probative value is substantially outweighed by the danger of unfair prejudice."[16]

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. After reviewing the transcript,[17] we find no abuse of discretion in the district court's decision to not exclude the tapes in their entirety. In support of his argument, Appellant claims that (i) none of Appellant's statements prove any element of the alleged crimes or show consciousness of guilt; (ii) the recorded conversations took place two years after the predicate offenses occurred; (iii) many of Appellant's arguments were made in response to questions instigated by the government witness; and, (iv) any relevant conversations were intertwined with others that were not relevant. We find none of these arguments persuasive.

As the district court found, the tapes included highly probative evidence regarding Appellant's consciousness of guilt, including admissions. The tapes were directly relevant to the government's theory regarding both Appellant's involvement in the attempted arson and the conspiracy. Indeed, we note that Appellant's counsel conceded as much during the hearing on the tapes' admissibility: "I concede, Judge, that there were

parts that, given the Government's position and its interpretation, are relevant."
(Transcript, Vol. 2 at 12).

For example, the February 24, 1994, tape includes a conversation regarding the payment of Schaller's legal fees. Not only did it corroborate Schaller's testimony that Appellant assisted in the payment of Schaller's legal fees, this conversation included evidence from which the jury could draw an inference "that this money is being paid because these gentlemen were in on the deal together." (Transcript Vol. 4 at 9). The March 1, 1994, tape includes an admission by Appellant that he threw matches to light the fire during the first attempt: "You weren't there when I threw the [expletive] matches the first time." The March 4, 1994, tape includes an adoptive admission by Appellant regarding his attempts to burn the restaurant during a conversation about whether Appellant had told anyone about those efforts. While Appellant denies telling anybody else about his efforts, he responds to Schaller's questions directly without ever disputing the veracity of what Schaller's questions imply -- that Appellant "tried to burn it." The May 25, 1994, tape provides evidence of the conspiracy between Schaller and Appellant. The conversation demonstrates that, although they were confused as to their recollection of what they believed to be their respective roles, they clearly had conspired to burn the restaurant. This sampling of each of the four tapes clearly shows that, contrary to Appellant's claims, the recordings include statements by Appellant that are directly probative of both attempts and the conspiracy.

Appellant also points to the fact that the recorded conversations occurred two years after the alleged offenses, arguing that the recordings are neither closely intertwined with the charged offenses nor helpful in establishing Appellant's intent to commit the crimes charged. Appellant cites to three cases addressing the admissibility of evidence under Fed. R. Evid. 404(b). See United States v. Huff, 959 F.2d 731, 736 (8th Cir. 1992); United States v. Brookins, 919 F.2d 281, 286 (5th

Cir. 1990); United States v. Hodges, 770 F.2d 1475, 1480 n.4 (9th Cir. 1985). We agree with these cases that proximity in time is a factor to be considered in determining relevancy under Fed. R. Evid. 404(b) of "other crimes, wrongs, or acts." See, e.g., United States v. Fields, 871 F.2d 188, 197 (1st Cir. 1989) ("Probative value must be considered in light of the remoteness in time of the other act and the degree of the resemblance to the crime charged."); United States v. Currier, 836 F.2d 11, 17 (1st Cir. 1987) (noting that the prior bad acts were both close in time and in nature to the crime charged).[18] In addition, Appellant also points out that the tapes here are distinguishable from those admitted in Currier, based on the fact that the recorded conversations in that case occurred immediately prior to and after the crime charged and were; thus, found to "help[] establish appellant's intent to commit the crime charged." Id. Because the conversations here occurred two years after the predicate offenses, Appellant contends that the tapes cannot be said to be so "closely intertwined" with the predicate offenses so as to help establish Appellant's intent to commit the crimes charged.

We are unswayed by Appellant's arguments. Here, as we discuss below, no evidence of prior bad acts was admitted in this case; and, because Appellant has not cited to any cases holding that proximity in time is a prerequisite for determining relevance under Fed. R. Evid. 403, and because we have not found any, we are unconvinced that the timing of the conversations is of any consequence or otherwise undermines their strong relevance. See, e.g., United States v. Perkins, 926 F.2d 1271, 1279-80 (1st Cir. 1991) (finding no error in admission of post-conspiracy statements made to a government informant where court found statements were an admission corroborating trial testimony and reflected complicity and consciousness of guilt). Even assuming, arguendo, that proximity must be considered in determining relevance, we nonetheless find that even though the conversations occur two years after the attempt and conspiracy, they are "closely intertwined with the charged offense[s] . . . [and] [] provid[e] . . . significant contextual material" for the jury. Currier, 836 F.2d at

17 (citations omitted). As discussed above, while they do not necessarily show Appellant's intent to commit the attempted arson or to enter into a conspiracy, they do show Appellant's consciousness of guilt and complicity as well as the existence of a conspiracy. See Perkins, 926 F.2d at 1279-80.

While not all evidence with probative value is admissible, we do not find that its value is "substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. In reviewing the balancing undertaken by the district court, we give great deference to the district court's judgment, and "[o]nly in exceptional circumstances will we reverse the exercise of a district court's informed discretion vis-à-vis the relative weighing of probative value and unfairly prejudicial effect." Currier, 836 F.2d at 18 (quoting United States v. Griffin, 818 F.2d 97, 101-02 (1st Cir.), cert. denied, 484 U.S. 844 (1987)). Based on our review of the record, we do not find that the probative value of the tapes -- as edited[19] – was outweighed by unfairly prejudicial evidence. See, e.g., United States v. Muñoz, 36 F.3d 1229, 1233 (1st Cir. 1994) (noting that the question under Rule 403 is one of unfair prejudice, not prejudice alone); Currier, 836 F.2d at 18 ("Unfairly prejudicial evidence is evidence . . . that 'triggers [the] mainsprings of human action [in such a way as to] cause the jury to base its decision on something other than the established proposition in the case.'") (quoting 1 Weinstein's Evidence § 403[03], 36-39 (1986)). Neither the fact that many of Appellant's remarks were made in response to questions or comments by the government witness, nor that relevant conversations were intertwined with non-relevant ones, persuades us to reach a different conclusion. Even the fact that the recordings reveal that Appellant had initially wanted to hire "a guy from organized crime so to speak" to burn the restaurant, (Transcript, Vol. 4 at 32), or that Appellant tells Schaller what to say about pouring the gasoline, (Transcript, Vol. 4 at 44), does not make them unfairly prejudicial. Finally, we do not find that any "exceptional circumstances"[20] exist which warrant reversal of the district court's rulings.[21]

B. The Tapes' Prior Bad Act Evidence

We find Appellant's reliance on Fed. R. Evid. 404(b) to be irrelevant on appeal.[22]

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. While the transcript of the pre-trial hearing regarding the admissibility of the tapes shows that there were references to previous fires which arguably fall within Fed. R. Evid. 404(b), the record shows that these references were excised by agreement of the parties. (Transcript, Vol. 4 at 21). Not only does Appellant not specify on appeal what "other crimes, wrongs, or acts" under Fed. R. Evid. 404(b) were erroneously admitted into evidence, we find no mention of any in the portions that were admitted into evidence. Accordingly, we do not address this argument further.

C. The Tapes' Audibility

Lastly, as to Appellant's audibility argument, in exercising its broad discretion in ruling on the admissibility of tape recordings, even where portions are unintelligible, Font-Ramírez, 944 F.2d at 47, the district court "must decide whether 'the inaudible parts are so substantial as to make the rest more misleading than helpful.'" Id. (citations omitted) (quoting Gorin v. United States, 313 F.2d 641, 652 (1st Cir.), cert. denied, 374 U.S. 829 (1963)). While the district court found that there were segments of poor audio and static, the district court nonetheless decided to admit them. The

district court was swayed by the fact that the parties stipulated to the accuracy of the transcript as a true recording of the tapes.[23] We are similarly swayed and find no abuse of the court's broad discretion, even as to the March 1, 1994, tape about which the district court was most concerned. Based on our review of the transcript,[24] we disagree with Appellant's claim that the inaudible parts, when taken as a whole, were so substantial as to make the rest more misleading than helpful, because the transcript clearly evidences that sufficient portions of the tapes, including statements by both Schaller and Appellant, are audible. As discussed earlier, these segments are relevant because they include, inter alia, admissions by Appellant, tending to show consciousness of guilt and corroborate trial testimony. Furthermore, the district court gave a cautionary instruction to the jury that not only informed them that the tapes, but not the transcript, were evidence, but also that the jurors had to draw their own conclusions regarding their content and probative value based on what they themselves heard on the tapes.[25] United States v. Carbone, 798 F.2d 21, 26 (1st Cir. 1986) (finding that the judge's handling of the transcript was in accord with the law where the record shows that the judge carefully instructed the jurors that the tapes, not the transcripts, were evidence and that any differences between the two must be resolved in favor of what was heard on the recording). Based on the record, and particularly in light of Appellant's stipulation to the accuracy of the transcript as a true recording of the tapes, we find no abuse of discretion by the district court in admitting the tapes over Appellant's audibility objection.

IV. Appellant's Sentence

Finally, Appellant appeals his sentence imposed by the district court pursuant to the federal arson guidelines.[26] See U.S.S.G. § 2K1.4(a)(1)-(4). The arson guidelines provide, in pertinent part:

(a) Base Offense Level (Apply the Greatest):

(1) 24, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; . . .

(2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; . . .

(3) 2 plus the offense level from ?F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or

(4) 2 plus the offense level from ?B1.3 (Property Damage or Destruction).

U.S.S.G. § 2K1.4; see U.S.S.G. App. C, Amendment 330 (restructuring the arson guidelines). New language in the Commentary, Application Note 2, provides that "[c]reating a substantial risk of death or serious bodily injury includes creating that risk to firefighters and other emergency and law enforcement personnel who respond to or investigate an offense." See, e.g., United States v. Turner, 995 F.2d 1357, 1365 (6th Cir. 1993) (finding that endangering firefighters is an appropriate factor); United States v. Grimes, 967 F.2d 1468, 1471 (10th Cir.), cert. denied, 506 U.S. 927 (1992) (noting that several other circuits had come to the same conclusion).

Appellant challenges the district court's sentence on three separate grounds. We address them in turn, reviewing findings of fact for clear error, mindful that they need only be supported by a preponderance of the evidence, and reviewing questions of law de novo, including the scope and applicability of a relevant guideline. See 18 U.S.C. § 3742(e); United States v. Martínez- Martínez, 69 F.3d 1215, 1224 (1st Cir. 1995); United States v. Thompson, 32 F.3d 1, 4 (1st Cir. 1994).

A. The "Fraud or Deceit" Base Offense Level

First, Appellant contends that the district court should have applied U.S.S.G. § 2K1.4(a)(3), which requires computation of the base offense level as 2 plus the base offense level for "Fraud and Deceit." Appellant argues that the overwhelming evidence at trial established that his primary purpose was to defraud the insurance company and that Appellant, while creating some risk of death or serious bodily injury by pouring gasoline, did not knowingly create a substantial risk. While the record does indicate that Appellant participated in a scheme to defraud the insurance company, we conclude that the district court properly chose subparagraph § 2K1.4(a)(1) based on its specific finding -- which, as we discuss below, was not clearly erroneous -- that Appellant knowingly created a substantial risk of death or serious bodily injury to persons other than the participants in the attempted arson. See Grimes, 967 F.2d at 1472 (holding that district court properly rejected application of fraud guideline, § 2K1.4(a)(3), and properly applied § 2K1.4(a)(2) in case involving defendant's effort to obtain insurance through arson where defendant created substantial risk of injury or death). The arson guideline instructs that the base offense level is determined by selecting the highest level from among four choices. Section 2K1.4(a)(1)-(4); United States v. Mizrachi, 48 F.3d 651, 655 (2d Cir. 1995). The Government contends that applying § 2K1.4(a)(3) would only yield a base offense level of 19, less than that under § 2K1.4(a)(1), which is 24. Appellant does not dispute this calculation or otherwise present his own § 2K1.4(a)(3) calculation, nor was there any discussion of this issue during the sentencing hearing. Assuming, without deciding, that calculation under § 2K1.4(a)(3) would have yielded only a base offense level of 19, we conclude that the district court correctly applied § 2K1.4(a)(1) because it yielded the highest base offense level based on its finding that Appellant knowingly created a substantial risk of bodily injury. Cf. Mizrachi, 48 F.3d at 656 (affirming district court's application of § 2K1.4(a)(3) in sentencing defendant for arson, mail fraud, and money laundering offenses where facts yielded an initial base offense level of 35).

B. Knowing Creation of a Substantial Risk

Second, Appellant argues that the district court's finding that Appellant knowingly created a substantial risk of death or serious bodily injury to any person other than a participant in the offense is not supported by a preponderance of the evidence. Whether a defendant knowingly created a substantial risk of death or serious bodily injury within the meaning of section 2K1.4 of the Guidelines raises an issue of first impression in that this court has not previously determined what level of knowledge is required under § 2K1.4(a)(1)(A). At the outset, we note that this determination involves a two-step inquiry. A court must first ask whether the defendant's actions created a substantial risk of death or serious bodily injury and then decide whether the defendant acted knowingly in creating that risk. See United States v. Karlic, 997 F.2d 564, 568- 69 (9th Cir. 1993) (stating that the first inquiry is objective and the second is subjective).

1. The Substantial Risk . . .

Leaving aside the question of knowledge for the moment, we conclude first that the district court did not clearly err in finding that Appellant created a substantial risk of death or serious bodily injury to any person other than a participant in the offense. The district court based its finding primarily on the PSR, which indicated, inter alia, that the presence of gasoline created the potential for a fire or explosion. According to the PSR, a fuel air explosion could have occurred had "a heat source been introduced within a specific danger range between the place where the gasoline was poured and anyplace within the building where the odor of gasoline was detected," (PSR, at 22), and that "because the gasoline was poured in a confined area which contained electrical outlets, an electrical spark or other heat source could have ignited the vapors in the confined area at any time," (PSR, at 23). Although the evidence indicates that Appellant only planned to ignite the fire after the restaurant closed, the district court concluded that the potential for a fuel air explosion or for a fire

to start accidentally created a substantial risk of death or serious bodily injury to the occupants of the building at the time of the pouring of the gasoline in the attic as well as to firefighters and others who would respond to the incident.

We find no clear error in this finding of substantial risk to patrons and firefighters. It was properly based on both the PSR and the sentencing judge's common sense understanding -- which Appellant conceded during the sentencing hearing was appropriate -- of the risks associated with pouring an accelerant to start a fire in an occupied building where there was the potential for a fuel air explosion to occur or for a fire to start accidentally. See Medeiros, 897 F.2d at 20 (relying on common sense in finding under earlier arson guidelines that defendant conspired "to cause the kind of fire that recklessly would endanger others."). As the district court correctly noted in response to Appellant's insistence that there was no risk created because no fire actually occurred, (Sentencing Transcript, pages 19-22), the Guidelines speak of "risk." "The fact that fortuitously no one was injured and extensive damage did not result [because no fire or explosion actually occurred] does not further [A]ppellant's contention that he did not . . . create a substantial risk of death or serious bodily injury." United States v. Honeycutt, 8 F.3d 785, 787 (11th Cir. 1993).

Furthermore, in light of the federal arson guidelines' commentary, see U.S.S.G. § 2K1.4, Application Note 2, we find no clear error in the district court's finding of substantial risk given its finding that firefighters "could have been blown to smithereens" had a spark ignited the gasoline vapors (Sentencing Transcript, at 20). See, e.g., Turner, 995 F.2d at 1365; Grimes, 967 F.2d at 1471. While "all fires present some danger to firefighters required to extinguish it, . . . [w]here a spectacular fire is planned near an occupied building, a finding of reckless endangerment to firefighters would be based on a common sense understanding of the risks of putting out a major fire when rescue attempts are likely to be necessary." Medeiros, 897 F.2d at 20. Similarly, here, although there is no evidence that Appellant planned a "spectacular fire," the

sentencing judge's finding of substantial risk in this case was based on his -- and, again, our -- common sense understanding of the risks associated with using an accelerant in an occupied building to start a fire where there was the potential for a fuel air explosion to occur or for a fire to start accidentally.[27]

2. . . . Knowingly Created

Next, we must decide whether the district court clearly erred when it found that Appellant knowingly created this substantial risk. While we review the court's factual finding for clear error, the definition of a Guidelines term is a question of law which we review de novo. Martínez- Martínez, 69 F.3d at 1224.

Looking first to the statute, we note that the two highest base offense levels in the federal arson guidelines, § 2K1.4(a)(1) and § 2K1.4(a)(2), contain almost identical language. The latter, for which there is a base offense level of 20, applies to the creation of a substantial risk of death or serious bodily injury. The former, for which there is a base offense level of 24, applies to the knowing creation of such a risk. This structure clearly suggests that there must be a meaningful distinction between the two sections. See Honeycutt, 8 F.3d at 787 (noting that "[c]learly it was intended for there to be a distinction between the two sections"). [28] creation of that risk). As the court noted, "fires are inherently dangerous, and the knowledge that firefighters and emergency personnel respond to virtually all fires can ordinarily be presumed." Honeycutt, 8 F.3d at 787. "The arsonist must know that a specific fire for some reason poses a substantial risk of death or serious bodily injury to firefighters and emergency personnel who may respond." Id. Given the structure of the arson guidelines, we conclude that § 2K1.4(a)(1)(A) requires that the district court make a specific finding that the defendant "knowingly" created a substantial risk of death or serious bodily injury, as opposed to merely finding that defendant recklessly (or negligently) created such a risk which would more appropriately trigger application of § 2K1.4(a)(1)(B). Apart from this rather straightforward

observation, no guidance is gleaned from the Sentencing Guidelines, as "knowingly" is not defined. In addition, the usual rule of giving an undefined statutory term its plain meaning provides little direction given that "'[k]nowledge' means different things in different contexts." United States v. Spinney, 65 F.3d 231, 236 (1st Cir. 1995).

Our own precedent is of little help because, while this court has addressed the application of the federal arson guidelines, see Medeiros, 897 F.2d at 18 (applying former U.S.S.G. § 2K1.4(b)(2) and affirming district court's finding that defendant "recklessly endangered the safety of another"); see also, United States v. Flowers, 995 F.2d 315, 316 (1st Cir. 1993) (involving but not discussing application of § 2K1.4); United States v. Johnson, 952 F.2d 565, 585 (1st Cir. 1991) (same), it has never addressed what level of knowledge is required under the highest offense level where the substantial risk was created knowingly by the defendant.

Turning to our fellow circuits, we note that the Ninth Circuit, and later the Eleventh Circuit, adopted the definition of "knowingly" as used in the Model Penal Code (the "MPC") when applying § 2K1.4. See Honeycutt, 8 F.3d at 787; United States v. Karlic, 997 F.2d 564, 569 (9th Cir. 1993). Drawing from the MPC's definition,[29]

A person acts knowingly with respect to a material element of an offense when: . . .

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Model Penal Code § 2.02(2)(b) (1985). The Model Penal Code also states that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes it does not exist." Model Penal Code § 2.02(7) (1985). the Ninth Circuit held that "a

defendant can be found to have 'knowingly' created a substantial risk of death or serious bodily injury under § 2K1.4 only if the defendant was aware that a substantial risk of death or serious bodily injury was 'practically certain' to result from the criminal act." Karlic, 997 F.2d at 569; accord, Honeycutt, 8 F.3d at 787. We note that other courts have neither explicitly defined "knowingly" nor adopted the MPC's definition, apparently finding it unnecessary where the district court could clearly conclude from the facts whether the defendant knew his actions created a substantial risk of death or serious bodily injury. For example, in United States v. Markum, 4 F.3d 891 (10th Cir. 1993), the court found that a fire set with gasoline during business hours which put firefighters in severe jeopardy because of the ferocity of the fire and the risk of explosion constituted "circumstances [which] more than justified the district court's finding that [defendant], as a co-conspirator, knowingly created a substantial risk of death or serious bodily injury." Id. at 896-97. Similarly, in United States v. Turner, 995 F.2d 1357 (6th Cir.), cert. denied, 114 S. Ct. 282 (1993), the district court concluded that defendant's actions could fit under either § 2K1.4(a)(1)(A) or (B). As to the defendant's knowledge, the court found that defendant knowingly created the substantial risk given that people in the residence adjacent to the burning building were likely to be asleep and windy conditions would cause the fire to spread quickly. Id. at 1365. The court in Turner also found that defendant "should have known" that he was placing firefighters at a substantial risk by committing the arson in weather conditions that would make extinguishing the fire extremely difficult. Id.

As this relevant case law provides at least two distinct approaches, we find it helpful when considering the question of "knowledge" to recall that "the length of the hypothetical knowledge continuum" is marked by "constructive knowledge" at one end and "actual knowledge" at the other with various "gradations," such as "notice of likelihood" in the "poorly charted area that stretches between the poles." Spinney, 65 F.3d at 236-37 (discussing the continuum in the context of the "shared knowledge" requirement in prosecution of aiding and

abetting armed robbery). In terms of this continuum, "practical certainty" would seem most akin to "actual knowledge." Id. (noting that "[a]ctual knowledge, after all, is certain knowledge"). We are inclined to conclude that a showing of knowledge anywhere along this continuum satisfies application of § 2K1.4(a)(1)(A).[30] This approach would be consistent both with the guidelines' mandate that a meaningful distinction be made between the two highest base offense levels as well as with the "common sense" approach we endorsed in Medeiros. See Medeiros, 897 F.2d at 20. That said, however, at this juncture we need not definitively resolve what level of knowledge, in addition to "actual knowledge," is required. Even assuming without deciding that, for § 2K1.4(a)(1)(A) to apply, Appellant had to be "aware that a substantial risk of death or serious bodily injury was 'practically certain' to result from the criminal act," Karlic, 997 F.2d at 569, we reject Appellant's contention that the district court's findings are clearly erroneous.

On appeal, Appellant argues that the district court clearly erred in finding that he knowingly created the substantial risk, because "[it] made no finding that a substantial risk of death or serious bodily injury was 'practically certain' to result from his [attempted arson]." Appellant contends that the district court's findings that the restaurant was occupied at the time the gasoline was poured and that the vapors could have been accidentally ignited is insufficient for the application of § 2K1.4(a)(1)(A), because the record does not show by a preponderance of the evidence that Appellant was "practically certain" that an accidental cause could have started the fire.

Giving due deference to the court's application of the guidelines to the facts, we conclude that the district court did not clearly err in finding that Appellant "knew that . . . there was a substantial risk of death or serious bodily injury" (Sentencing Transcript at 23). In arriving at our conclusion, we note that facts contained in a presentence report ordinarily are considered reliable evidence for sentencing purposes. See United States v. Morillo, 8 F.3d 870, 872 (1st Cir. 1993).

Indeed, district courts possess "broad discretion to determine what data is, or is not, sufficiently dependable to be used in imposing sentence." United States v. Tardiff, 969 F.2d 1283, 1287 (1st Cir. 1992). This is particularly true where, as here, Appellant offered no evidence to suggest an inaccuracy in the presentence report's facts. Id., 8 F.3d at 873 (collecting cases).

The record shows that, at the time of the first attempt,[31] Appellant knew that at least two other employees, including Schaller (who at that time was not a participant in the offense), were in the restaurant. As the court in Honeycutt noted, "[i]t is difficult to imagine a clearer illustration of the knowing creation of a substantial risk of death or serious bodily injury." Honeycutt, 8 F.3d at 787 (affirming application of § 2K1.4(a)(1)(A) where defendant threw a Molotov cocktail at a structure that he admitted he knew was occupied). In terms of our continuum, this strikes us as constituting "actual knowledge" and/or "practical certainty."

At the time of the second attempt, the record shows that gasoline was poured, hours before the intended ignition, in a confined area atop the Galleria II at a time when both patrons and employees were inside. Appellant knew gasoline was a highly flammable liquid and he arranged for it to be poured for the specific intent of lighting a fire after business hours. In response to Appellant's "practical certainty" argument, the district court found that "the fact that [Appellant] . . . wanted to [ignite] the fire outside of business hours, suggests . . . that he knew of the risk" to people inside the building and to those who would respond to the fire. (Sentencing Transcript at 18). Contrary to Appellant's contentions, these findings are sufficient for the application of the highest base offense level. While Appellant may not have been aware that it was "practically certain" that a fire could ignite accidentally or that the restaurant and any occupants could be blown to "smithereens," (Sentencing Transcript at 20), we remind Appellant -- as the district court did more than once -- that the guidelines call for the knowing creation of a substantial risk. Here, a preponderance of the evidence supports the finding

that Appellant was aware that a substantial risk of death or serious bodily injury was "practically certain" to result from the use of a highly flammable accelerant for purposes of starting a fire. Appellant presented no evidence to rebut the preponderance of the evidence presented on this point. Furthermore, we find irrelevant whether or not Appellant was "practically certain" that an accidental ignition would occur given that the record supports a finding that he was "practically certain" that he was creating a substantial risk of death or serious bodily injury. Finally, the district court again correctly rejected Appellant's argument that he did not knowingly create a risk because no fire or explosion actually occurred. See Honeycutt, 8 F.3d at 787 ("[t]he fact that fortuitously no one was injured and extensive damage did not result does not further [A]ppellant's contention that he did not knowingly create a substantial risk."). At issue is Appellant's state of mind, not the actual results of his actions. Id.; cf. Medeiros, 897 F.2d at 20 (finding that the defendant "specifically intended to cause the kind of fire that recklessly would endanger others").

C. Two-Level Enhancement for Leadership Role

Finally, Appellant appeals the two-level enhancement which the district court imposed for his leadership role in the offense. See U.S.S.G. § 3B1.1(c). As we have said before, "role in the offense" determinations are fact intensive and we normally review for clear error. See United States v. Tejada-Beltrán, 50 F.3d 105, 111 (1st Cir. 1995); United States v. Schultz, 970 F.2d 960, 963-64 (1st Cir. 1992), cert. denied, 506 U.S. 1069 (1993) (citations omitted). Appellant argues that he and Schaller were, at best, "equals" and nothing more than "partners in crime."

Under U.S.S.G. § 3B1.1(c), a two-level enhancement is warranted if the sentencing court determines that the criminal enterprise involved at least two participants, and the defendant exercised control over, or was otherwise responsible for organizing the activities of, at least one other individual in committing the crime. See, e.g., Morillo, 8 F.3d at 872; United

States v. Akitoye, 923 F.2d 221, 227 (1st Cir. 1991). For purposes of determining the overall number of participants, the defendant himself may be counted as one participant; "[b]ut, he must exercise control over at least one other participant to warrant an upward adjustment." Morillo, 8 F.3d at 872 n.13. In determining whether a defendant is an organizer or leader, the Sentencing Guidelines direct judges' attention to seven factors, including "th exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1, comment.; see Tejada-Beltrán, 50 F.3d at 111-13 ("This list is intended to be representative rather than exhaustive."). Finally, the government must bear the burden of proving that an upward role-in-the-offense adjustment is warranted. Id. at 872.

Here, it is undisputed that Appellant and Schaller participated in the attempted arson of the Galleria II. Contrary to Appellant's contention that he and Schaller were mere "equals," evidence was submitted at trial that it was Appellant's idea to burn the Galleria II; that Appellant devised the time and method of committing the offense; that Schaller was persuaded and, ultimately, recruited by Appellant after Appellant failed to hire someone else to commit the offense and after his unsuccessful attempt to start a fire in the attic; and that Schaller poured the gasoline at Appellant's request and informed Appellant when he was finished. Contrary to Appellant's argument, these factual findings satisfy the requirements for applying § 3B1.1(c). We are unpersuaded by Appellant's argument that the fact that Appellant asked or persuaded Schaller to pour gasoline does not show supervision over him. While it may not show supervision, it certainly shows -- at a minimum -- Appellant's exercise of decision making authority, his recruitment of accomplices, and the greater degree of his participation in planning and organizing the two arson attempts. Thus, finding no clear error in the district court's determination

of Appellant's role, [32] affirm the district court's adjustment based on the evidence of Appellant's role in the offense. we affirm the district court's two-level enhancement. United States v. García, 954 F.2d 12, 18 (1st Cir. 1992) (noting that, absent a mistake of law, sentencing court's role- in- the- offense determination is reviewed only for clear error).

CONCLUSION

For the foregoing reasons, the district court's judgment and sentence is, in all respects, Affirmed

a co-manager. Who else was involved in the management of the restaurant

A. Shelley McKenna.

Q. What did she do?

A. Shelley McKenna was in charge of the bookkeeping for the restaurant, and she also was responsible for the cash, and the day-to-day operations of the restaurant.

Q. Did you know her before working at the Galleria II?

A. Yes.

Q. How was that?

A. She had also worked for Gerard and continued to work for Gerard for many years.

Q. What, if anything, did Gerard DiSanto do regarding the management of the restaurant when it first opened?

A. Not too much. It was ppretty much Shelley and myself who were running the restaurant.

Q. Now, in the beginning of the restaurant when it first opened, how often did you speak with the defendant about the Galleria II Restaurant?

A. On a daily basis.

Q. When you say "daily basis," was that on the phone or in person?

A. Usually in person.

Q. Where was that?

A. At the club that he owns in Providence, Gerardo's.

DIRECT SCHALLER

Q. What type of club is that?

A. A gay night club.

MR. GONNELLA: Your Honor, may we approach the side bar?

THE COURT: Yes.

(Side bar.)

MR. GONNELLA: Your Honor, I do object, and I move to pass the case at this time. I think that comment was completely gratuitous. There was no need for it. And it was designed specifically to, solely to inflame the passions and prejudice of this jury. It denies my client a fair trial now, and it wasn't necessary. It had no place in this trial. So I object and move to pass the case.

THE COURT, Did you have anything you want to say about this?

MR. GRIFFIN: Yes. I entirely disagree, your Honor, strictly background information, and it was not -- the testimony is not elicited to create any type of prejudice. It's strictly a -- he runs a night club, and it's a gay night club. It's not a big deal. The Government doesn't -- the Government didn't intend it to--

THE COURT: I am sure that's right, Mr. Griffin. The problem that I have is that I don't know whether there is somebody on the jury who may have some disposition about somebody who has run a gay bar.

MR. GONNELLA: Your Honor, may I just say something. The night club is not a gay night club. The people who frequent there may be gay.

THE COURT: It doesn't matter whether it is or not. He said it was. The real problem is that's what he said.

MR. GOMELLA: A night club, is only a gay night club. It's the people that frequent it that may or may not be gay.

THE COURT: I understand. All I'm saying is he said it, and there may be some people that -- who may have a view that someone who runs a gay bar may not be an upstanding citizen.

MR. GRIFFIN: Your Honor, in my mind, it's like running an Italian restaurant or Chinese restaurant.

THE COURT: It may be in your mind, but I don't know what's in the mind of the jury.

MR. GRIFFIN: At this point the Court can simply instruct the jury that it's sufficient to know that the defendant ran a night club in Providence, and that any other reference to it should not be --

THE COURT: I think what I am going to do -- you have asked for a mistrial, didn't you?

MR. GONNELLA: Yes, your Honor.

THE COURT: I think what I am going to do is

this: I think maybe I will ask the jurors whether this is a question that is going to concern them, that testimony and --

MR. GONNELLA: As a panel or individually?

THE COURT: As an individual, individually.

MR. GONNELLA: Okay.

THE COURT: And we will do it that way. I won't allow your motion, but I will instruct the jurors.

Now, the question is should we go on now, or should I do this at this point?

MR. GONNELLA: I think I should know the answer. It makes sense to us, doesn't it?

THE COURT: Okay. All right. Sit back. (End of side bar.)

THE COURT: Ladies and gentlemen, there is something that has just been brought to my attention that I might have asked you at the time we selected you as jurors. I wasn't aware at the time, so I didn't get a chance to ask you that, so I will need to ask you each a question, and I am going to ask you individually to come over to meet me at the side bar, one by one, and let me inquire of you about something concerning this trial.
So again, I apologize for the disruption, but I am going to have to do this.

(Side bar.)

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THE COURT: Mr. Small.

THE CLERK: Mr. Small.

THE COURT:Come in. How are you doing, ma'am?

THE JUROR:Good.

THE COURT:You heard testimony just now that the defendant owned a gay bar in Rhode island?

THE JUROR: Uh-huh.

THE COURT: And I need to know from you whether the fact that you heard that evidence would affect your decision in this case concerning whether he is guilty or innocent?

THE JUROR: No.

THE COURT: Stand in for a minute. Do you have any views about anybody who may operate a bar like that, one way or the other?

THE JUROR: No.

THE COURT: It won't affect your view at all?

THE JUROR: No.

THE COURT: Okay. You may take your seat.

THE CLERK: Ms. Kleimon.

THE COURT: Good morning, Ms. Kleimon, or good afternoon. How are you?

THE JUROR: Good.

THE COURT: Ms. Kleimon, I have to do this. Let me just ask you this: You just heard testimony from this

witness that the defendant in this case, Mr. DiSanto, operates a gay bar in Providence, and I need to find out from you whether you would be affected in your decision about his guilt or innocence in this case by the fact that you heard testimony that he operated such a bar.

THE JUROR: No, sir.

THE COURT: The fact a person operates a bar, a gay bar, would that affect you one way or the other?

THE JUROR: No.

THE COURT: Are you still able to decide this case based on the evidence and law as I instruct you?

THE JUROR: Yes.

THE COURT: Thank you. You may be seated.

THE CLERK: Ms. Nagle.

THE COURT: Ms. Nagle, how are you this morning?

THE JUROR: Fine. How are you?

THE COURT: I'm sorry to interrupt you like this, but I need ask you this: You just heard testimony from this witness that the defendant operates a gay bar in Providence, and I need to find out from you whether, having heard that testimony, you would be affected in any way in your decision about whether this defendant is guilty or not guilty of the charges against him.

THE JUROR: No, sir.

THE COURT: Then the fact that a person operates

a gay bar won't affect you in any way?

THE JUROR: No.

THE COURT: Can you decide this case solely on the evidence that you hear and the law, as I instruct the law?

THE JUROR: Uh-huh, yes.

THE COURT: Thank you. Take your seat. Thank you very much.

THE CLERK: Ms. Waldron.

THE COURT: Good morning. How are you? I'm sorry about all these interruptions and sorry about this one. I need to ask something. You just heard this witness testify that the defendant in this case operates a gay bar in Providence, and I need to know from you whether, having heard that testimony,

that would affect your ability to decide this case solely on the evidence and only on the evidence?

THE JUROR: No.

THE COURT: The fact that the defendant, you heard testimony that the defendant operates a gay bar would not affect your opinion in this case?

THE JUROR: No.

THE COURT: Can you keep sight, in this case, on the evidence and the law only?

THE JUROR: Yes.

THE COURT: Okay. Take your seat.

THE CLERK: Mr. Chin.

THE COURT: Hi, Mr. Chin.

THE JUROR: Yes.

THE COURT: Sorry to interrupt and this one in particular, but I need to ask you something. You just heard testimony from the witness on the stand that the defendant operated a gay bar in Providence, Rhode Island, and I need to know from you whether, having heard that testimony, or that testimony would affect your ability in deciding this case solely on the evidence?

THE JUROR: No.

THE COURT: Then the fact that he may or may not operated a gay bar would not affect you?

THE JUROR: No.

THE COURT: Can you decide this case solely on the evidence and the law as I instruct you?

THE JUROR: Yes.

THE COURT: And you wouldn't be affected by any testimony that he operates a gay bar in Providence?

THE JUROR: Right.

THE COURT: All right. Take your seat.

THE CLERK: Mr. Vranoo.

THE COURT: Good afternoon, sir. Sorry to

interrupt you like this. What's the correct pronunciation?

THE JUROR: Vranos.

THE COURT: Mr, Vranos, I need to ask you this question: You have heard testimony of this witness that the defendant operates a gay bar in Providence, Rhode Island. And I need to know from you whether, having heard that testimony, whether that testimony would affect your ability to decide this case solely on the evidence and only on the evidence?

THE JUROR: No, your Honor.

THE COURT: You don't have any disposition about -- predisposition about anybody that operates or may not -- may or may not operate a gay bar?

THE JUROR: No, your Honor.

THE COURT: Can you solely decide this case on the evidence?

THE JUROR: Yes, your Honor.

THE COURT: And that wouldn't affect your decision in one way or the other?

THE JUROR: Surely.

THE COURT: Take your seat. Thank you very much.

THE CLERK: Ms. Coughlin.

THE COURT: How do you do, Ms. Coughlin. I am sorry about all the interruptions, but I am sorry in

particular about this one, but there is something I failed to ask you that is very important.

You have just heard the witness on the stand testify that the defendant operates or did operate a gay bar in Providence. And I need to ask you whether, having heard that testimony, you would be more likely or less likely to feel that you can't decide this case solely on the evidence as to the defendant's guilt or innocence. In other words, will testimony that he operates a gay bar affect you in any way?

THE JUROR: No, it won't.

THE COURT: You don't have any views about people who operate a gay bar or not that would affect your decision in this case?

THE JUROR: No, sir, no.

THE COURT: Please take your seat.

THE CLERK: Ms. Kennedy-

THE COURT: Mrs. Kennedy, sorry to interrupt you. I am sorry, but I have to ask you a very important question. Mr. Schaller, the witness on the stand, just testified that the defendant operates a gay bar in Providence, Rhode Island. And had I known, I would have asked the panel this question in the beginning, but I need to know from you whether you can render a verdict fairly

and based on the evidence as to the defendant's guilt or innocence in this case without regard to whether he operated a gay bar.

THE JUROR: Yes.

THE COURT: That has no -- that would have no affect on your ability to render a fair verdict?

THE JUROR. No.

THE COURT: Thank you. Why don't you take your seat.

THE CLERK: Mr. Flynn.

THE COURT: Mr. Flynn, how are you doing today?

THE JUROR: Fine.

THE COURT: Sorry, sir, to inconvenience you, sorry for all these interruptions, but I have a very important question to ask you. You heard testimony from this witness that

the plaintiff -- rather the defendant operates a gay bar in Providence, Rhode Island.

THE JUROR: Yes.

THE COURT: The question I need to ask you is whether that would be -- that testimony would affect your ability to fairly render a verdict in this case as to the defendant's guilt or innocence.

THE JUROR: No.

THE COURT: The fact that they may have operated a gay bar wouldn't affect your decision one way or the

other?

THE JUROR: No.

THE COURT: Thank you. You may take your seat.

THE CLERK: Mr. Semertgakis.

THE COURT: How are you, air?

THE JUROR: Good.

THE COURT: I'm sorry to interrupt so many times. Listen, you just heard the witness say that the defendant operates a gay bar in Providence, Rhode Island. And I need to know whether, having heard that testimony, you would be affected in any way by the fact that he may have operated a gay bar.

THE JUROR: No, air.

THE COURT: Can you be fair, render a fair verdict based on the

evidence and on the law as I instruct?

THE JUROR: Would I be fair?

THE COURT: Yes.

THE JUROR: Yes.

THE COURT: And that wouldn't affect your decision one way or the other?

THE JUROR: No, it would not.

THE COURT: Thank you. You may take your seat.

THE CLERK: Mr. Correia.

THE COURT: How are you doing, air? I'm sorry for

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all the interruptions and sorry about this one in particular. I have to ask a question. You heard Mr. Schaller, the witness who is now on the stand, testify that he -- can you hear me?

THE JUROR: Yes.

THE COURT: The defendant operates or did operate a gay bar in Providence, Rhode Island. And I need to know from you whether or not the testimony of that kind would affect your ability to render a fair verdict based solely on the evidence and on the law as I instruct the law.

THE JUROR: No.

THE COURT: It won't affect you one way or the other?

THE JUROR: I have no problem with that.

THE COURT: All right, why don't you take your seat.

THE CLERK: Ms. Savard.

THE COURT: How are you, ma'am?

THE JUROR: Good. How are you?

THE COURT: I'm sorry about all the interruptions. You're related to the famous Savard family?

THE JUROR: No, I am not. I get asked all the time, though.

THE COURT: Listen, I just need to ask you this

question. You heard testimony a little while ago that the defendant operates a gay bar or did operate a gay bar in Providence, Rhode Island, and I need to know whether that testimony would affect your ability to render a fair verdict based on the evidence and on the law as I will instruct you on the law?

THE JUROR: No.

THE COURT: You wouldn't be affected one way or the other by the testimony in terms of your fairness to reach a verdict by that testimony?

THE JUROR: No.

THE COURT: All right. You may take your seat.

THE CLERK: Mr. Joudrey.

THE COURT: How are you doing, sir.

THE JUROR: Fine.

THE COURT: Sorry about the interruptions. I need to ask you a very important question about your acknowledgment of a question asked earlier about partiality and impartiality, and it's important to have an impartial jury, so I need to ask you. You heard the testimony from a witness that the defendant operated a gay bar in Providence, Rhode Island, and I need to know from you whether that would affect your ability to render a fair verdict in this case.

THE JUROR: No, sir, not at all.

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THE COURT: It wouldn't make a difference to you one way or the other in terms of your assessing the evidence of the defendants guilt or innocence in this case?

THE JUROR: No, air, not at all.

THE COURT: All right. You may take your seat.

THE CLERK: Ms. Newman.

THE COURT: Hi, Ms. Newman. I am sorry to bring you over here like this.

THE JUROR: That's okay.

THE COURT: You are getting a great indication of how our system works, aren't you? Let me ask you this: You heard testimony from the witness now on the stand that the defendant operates a gay bar in Providence, Rhode

Island. And I need to know whether that will affect your ability to render a fair verdict --

THE JUROR: No.

THE COURT: -- in this case. It wouldn't affect your ability, your fairness and your partiality one way or the other that he may have operated a bar like that in Providence?

THE JUROR: No.

THE COURT: Okay. You may take a seat -- or anywhere else, for that matter?

MS. NEWMAN: No.

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THE COURT: All right. I am satisfied.

MR. GONNELLA: Thank you, your Honor.

MR. GRIFFIN: Thank you.

(End of side bar.)

Q. (BY MR. GRIFFIN) Mr. Schaller, I would like to direct your attention to the time that the restaurant opened. Please describe the type of restaurant that it was, I am referring to the Galleria II?

A.A family-style restaurant and pub.

Q.What type of food was served?

A.Pizzas, pasta, chicken, sandwiches.

Q.How was the food priced?

A.Very moderately.

Q. And you testified that the restaurant opened in the spring of

1991. How was business after it first opened?

A.It was very good.

0.What was the volume of the business?

A.The place -- the restaurant was busy every night. Did that continue?

A.It continued through the summer, until right after the summer.

Q.What happened then?

A.The business dropped way down.

Q.When you say the "business dropped way down," how much down?.